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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
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9 JOSE VALENTIN MORA,

10 *Petitioner,*

11 vs.

12 BRIAN E. WILLIAMS, *et al.*,

13 *Respondents.*
14

2:10-cv-01165-KJD-RJJ

ORDER

15 This habeas action comes before the Court for initial review of the amended petition
16 (#6) under Rule 4 of the Rules Governing Section 2254 Cases (the “Habeas Rules”).

17 ***Background***

18 According to the pleadings and attachments, petitioner Jose Mora seeks to set aside
19 his 2007 Nevada state conviction, pursuant to a guilty plea, of level-three trafficking in a
20 controlled substance.

21 In the prior screening order (#4) in this federal habeas matter, the Court informed
22 petitioner, *inter alia*, of the pleading requirements of Habeas Rule 2 and that the claims in the
23 original petition lacked the specificity required under Rule 2. The Court gave petitioner an
24 opportunity to file an amended petition correcting, if possible, the deficiencies in the original
25 petition.

26 ***Governing Law***

27 Habeas pleading is not notice pleading, and a habeas petitioner must state the specific
28 facts that allegedly entitle him to habeas relief. See *Mayle v. Felix*, 545 U.S. 644, 655-56, 125

1 S.Ct. 2562, 2569-70, 162 L.Ed.2d 582 (2005). Even under a more liberal notice pleading
 2 standard, bare and conclusory assertions that constitute merely formulaic recitations of the
 3 elements of a cause of action and that are devoid of further factual enhancement do not state
 4 a claim for relief. See *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949-51 & 1954, 173
 5 L.Ed.2d 868 (2009). Accordingly, even under the more liberal notice pleading rules, the
 6 allegations of a pleading must “permit the court to infer more than the mere possibility” that
 7 a constitutional violation has occurred. ___ U.S. at ___, 129 S.Ct. at 1950. The stricter
 8 habeas pleading rules similarly require more than “mere conclusions of law, unsupported by
 9 any facts.” *Mayle*, 545 U.S. at 655, 125 S.Ct. at 2570. A habeas petitioner instead must
 10 “state facts that point to a real possibility of constitutional error.” *Id.*

11 ***Discussion***

12 ***Ground 1***

13 In Ground 1, petitioner alleges that he was denied effective assistance of counsel in
 14 violation of the Sixth Amendment, although the amended petition also refers to the state trial
 15 judge abusing his discretion in denying petitioner’s verbal motion to withdraw plea. Petitioner
 16 alleges in principal part that “I should have been allowed to withdraw my plea because it was
 17 very clear that the attorney/client relation had deteriorated fully.” He alleges ineffective
 18 assistance of his trial counsel due to counsel failing to move to withdraw his plea before
 19 sentencing; and, as noted, he alleges that the trial court abused its discretion in not granting
 20 his verbal motion to withdraw the plea. Petitioner additionally alleges that “it is a fact” that he
 21 was not caught with any drugs in his possession, that he was not photographed selling the
 22 drugs, and that his brother was living at the apartment in question rather than him.

23 The prior screening order informed petitioner that he “must allege the actual factual
 24 specifics upon which he relies to establish that he had a conflict with his counsel that gave
 25 him a viable basis upon which to withdraw his plea.” Petitioner failed to do so. Bare formulaic
 26 allegations merely that a defendant allegedly had a “conflict” with his counsel and had lost
 27 confidence in his counsel do not provide a basis for a criminal defendant to withdraw a guilty
 28 plea. Moreover, allegations that the defendant did not have the drugs in question in his direct

1 physical possession at arrest, that he was not photographed selling the drugs, and that
 2 someone else lived at an involved apartment do not necessarily lead to a conclusion that the
 3 defendant was not guilty of a drug trafficking offense, particularly following the entry of a guilty
 4 plea. Petitioner's suggestion, e.g., that he had to be photographed selling the drugs in
 5 question in order to be found guilty simply is naive. Under the applicable pleading standards,
 6 petitioner must allege specific facts that point to more than the mere possibility that a
 7 constitutional violation has occurred.¹ He has failed to do so in Ground 1.

8 Ground 1 accordingly fails to state a claim upon which relief may be granted.

9 **Ground 2**

10 In Ground 2, petitioner alleges that he was denied effective assistance of counsel in
 11 violation of the Sixth Amendment when counsel: (a) failed to "investigate the fact that I did not
 12 possess or sell any drugs;" (b) failed to "advise me of the sentencing consequences of my
 13 plea;" (c) "did not get the name/identity of the informant used by the State to lie for his or her
 14 own benefit;" and (d) failed to "motion to withdraw my guilty plea." Petitioner alleges that the
 15 fact that defense counsel was not trying to help him "is evident by his own admission that the
 16 contact with me had deteriorated." Petitioner alleges that he was denied effective assistance
 17 of appellate counsel when counsel failed to raise the foregoing issues on appeal. He asserts
 18 that the outcome of the appeal would have been different if counsel had raised an issue on
 19 appeal – following a guilty plea – maintaining that the informant received "some benefits for
 20 testimony against me and his/her motives for giving such testimony."

21
 22 ¹ See also *Blackledge v. Allison*, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977):

23 [T]he representations of the defendant, his lawyer, and the
 24 prosecutor at . . . a [plea] hearing, as well as any findings made by the judge
 25 accepting the plea, constitute a formidable barrier in any subsequent
 26 collateral proceedings. Solemn declarations in open court carry a strong
 presumption of verity. The subsequent presentation of conclusory
 allegations unsupported by specifics is subject to summary dismissal, as are
 contentions that in the face of the record are wholly incredible.

27 431 U.S. at 73-74, 97 S.Ct. at 1629. Under *Blackledge*, a collateral attack that directly contradicts the
 28 responses at the plea proceedings "will entitle a petitioner to an evidentiary hearing only in the most
 extraordinary circumstances." *Id.*

1 Petitioner, again, must allege specific facts supporting his claims and must present
2 facts that point to more than the mere possibility that a constitutional violation has occurred.
3 Conclusory assertions, following a guilty plea, that counsel failed to investigate the “fact” that
4 the petitioner did not commit the offense,² failed to advise the petitioner of unspecified
5 “sentencing consequences,” failed to pursue a claim that an unidentified informant received
6 “some benefits” and had “motives” to testify against petitioner, and failed to move to withdraw
7 the plea because the relationship between petitioner and counsel had “deteriorated”,³ fails to
8 state a viable claim of ineffective assistance of counsel.

9 Ground 2 accordingly fails to state a claim upon which relief may be granted.

10 **Ground 3**

11 In Ground 3, petitioner alleges that he was denied effective assistance of counsel in
12 violation of the Sixth Amendment, although the claim also appears to challenge the state trial
13 court’s failure to hold an evidentiary hearing before the plea colloquy and sentencing
14 regarding the alleged conflict between petitioner and his counsel. Petitioner alleges that “I
15 tried in every way to make the judge aware of the conflict with counsel and my desire to
16 withdraw my plea.” He alleges that in such a hearing, “the court would have been able to give
17 a full and fair hearing of my claims under the 6th Amendment,” but he presents no
18 nonconclusory allegations specifying what such a hearing would have shown. Petitioner
19 again refers to, *e.g.*, the absence of any photographs or audiotapes proving that he trafficked
20 in drugs, and he maintains that counsel did not investigate the fact that he worked each day.

21 Consistent with the discussion in Ground 1, bare allegations that a petitioner had a
22 “conflict” with his defense counsel, that he desired to withdraw his plea, that he was not
23 caught on audio or video tape trafficking drugs, and/or that he had a job do not point to more
24 than the mere possibility of constitutional error, particularly following a guilty plea.

25 Ground 3 accordingly fails to state a claim upon which relief may be granted.

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27 ²See also related discussion as to Ground 1.

28 ³See also related discussion as to Ground 1.

1 The petition, as amended, therefore will be dismissed without prejudice for failure to
2 state a claim upon which relief may be granted.

3 IT THEREFORE IS ORDERED that the petition, as amended, shall be DISMISSED
4 without prejudice for failure to state a claim upon which relief may be granted, following upon
5 petitioner previously having been given an opportunity to amend to state a claim.

6 IT FURTHER IS ORDERED that a certificate of appealability is DENIED, as jurists of
7 reason would not find the dismissal of the petition for failure to state a claim, after the
8 previously provided opportunity for amendment, to be debatable or wrong.

9 The Clerk of Court shall provide petitioner a copy of #6 with this order, and the Clerk
10 shall enter final judgment accordingly, in favor of respondents and against petitioner,
11 dismissing this action without prejudice.

12 DATED: February 3, 2012

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KENT J. DAWSON
United States District Judge